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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 193

JOHN LAMBE JACKSON, *et al.*,

Petitioners,

vs.

STEAMSHIP "ARCHIBURN"; LAMPORT & HOLT LINE, LTD., Claimant,

Respondent.

BRIEF FOR RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BURLINGHAM, VEEDER, MASTEN & FERRETY,
Proctors for Respondent.

VAN VECHTEN VEEDER,
WILLIAM J. DEAN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

JOHN JAMES JACKSON, *et al.*,
Petitioners-Libellants,

AGAINST

Steamship ARCHIMEDES,
LAMPORT & HOLT LINE, LTD.,
Respondent.

No. 108
October Term
1927

This is a writ of certiorari in review of the affirmance by the Circuit Court of Appeals for the Second Circuit of a decree of the District Court for the Southern District of New York dismissing the libel. The Circuit Court of Appeals affirmed on the opinion of District Judge Augustus N. Hand, which is printed at page sixty-two of the record and is reported 10 F. (2d) 234.

STATEMENT

The petitioners are five British seamen who sue the British steamship *Archimedes* for the recovery of wages and waiting time. They joined the *Archimedes*, May 19, 1922, at Manchester, England, for a round voyage to the United States, receiving as advance wages negotiable notes, four for £4 and one for £2. Such advances were sanctioned by British law. The steamer proceeded to New York, where the appellants demanded half wages under section 4530, U. S. Revised

Statues, at a time when no wages were due if the appellants were legally chargeable here with the advances received in England. Their demand having been refused, they quit the ship and brought this suit. They contend that the advances, although legal where received, were invalid here under section 11 of the Seamen's Act of 1915, as amended by section 32 of the Merchant Marine Act of 1920 (41 Stat. 1007).

ARGUMENT

FIRST POINT

SECTION 11 OF THE ACT OF MARCH 4, 1915, TO PROMOTE THE WELFARE OF AMERICAN SEAMEN IN THE MERCHANT MARINE OF THE UNITED STATES, AS AMENDED BY SECTION 32 OF THE MERCHANT MARINE ACT, 1920, DOES NOT INVALIDATE PAYMENT OF ADVANCES TO SEAMEN BY FOREIGN VESSELS IN FOREIGN PORTS.

The legislative and judicial history of this statute affords ample guidance to its meaning and application. For convenient reference the statute in its present form is printed in full at page 15, together with references to prior acts relating to advances and allotments.

(a) *Legislation prior to the Amendment of 1920.*

The original statutory prohibition of advances of wages to seamen embodied in Sec. 10 of the Act of June 26, 1884 (23 Stat. 55), was held by Judge Addison Brown to be inapplicable to the shipment of seamen in foreign ports by an American vessel. *The State of Maine,* 22 Fed. 734.

"Every presumption," said Judge Brown, "is against the supposition that Congress had any intention to legislate in reference to acts done and completed wholly beyond its juris-

diction. And while Congress might, perhaps, subject the masters of American vessels, upon their return to this country, to punishment for acts done on foreign soil, though such acts were lawful there, still, such an intention would not be presumed. Nor is such an intention sufficiently indicated by mere general language, that can be fully satisfied by its application to all such acts committed within the territorial jurisdiction of the United States" (pp. 735-6).

The provision that the act "shall apply as well to foreign vessels as to vessels of the United States", was held by this Court to make it applicable to foreign vessels in American ports. *The Eudora,* 190 U. S. 169.

The statute was amended by Sec. 11 of the Seamen's Act of March 4, 1915 (38 Stat. 1168), where the section was enacted in its present form of five lettered paragraphs. As amended, Par. (*a*) repeated the provision of the prior act that

"The payment of such advance wages or allotment shall in no case except as herein provided absolve the vessel or the master or the owner thereof from the full payment of wages * * *."

And the reference to foreign vessels was amplified as follows:

"(*e*) This section shall apply as well to foreign vessels while in waters of the United States, as to vessels of the United States, and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner or agent of a vessel of the United States would be for similar violation.

"The master, owner, consignee, or agent of any vessel of the United States, or of any foreign vessel seeking clearance from a port of the United States, shall present his shipping articles at the office of clearance, and no clearance shall be granted any such vessel unless the provisions of this section have been complied with."

Thus amended the statute was held by the Circuit Court of Appeals for the Second Circuit to be inapplicable to ad-

vances made in a foreign port by American vessels. *The Windrush* and *The Rhine*, 250 Fed. 180. Judge Hough said:

"This is an amendment to existing law, and the presumption is that the same words used therein have the meaning acquired by prior judicial construction. *United States* v. *Trans-Missouri Ass'n*, 58 Fed. 67, 7 C. C. A. 15, 24 L. R. A. 73. * * * The remedial and penal portions of the part of the statute under consideration cannot be separated; if what these shipmasters did in Buenos Ayres was not lawful, it was unlawful, and a misdemeanor was committed. If it be possible now and in this country to enact a law making a crime of something done by an American citizen in a foreign land (*Rex* v. *Sawyer*, 1 C. & K. 101), every and the strongest presumption is against such construction (*American, etc. Co.* v. *United Fruit Co.*, 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Ann. Cas. 1047). The absurdity of considering the ship captains indictable is not denied; therefore the contention becomes this: That this executed contract must be set aside, because the statute in effect declares it repugnant to the 'policy and morality' of the people of the United States. We discover no consensus on this point of morals in the written law, there is no evidence on the subject, and the rule appealed to ordinarily affects only executory contracts. The situation here is this: Libelants demand a part of their wages in accordance with the law of the United States; respondents answer, We paid you that part in Argentine in accordance with the law of that country; libelants reply, The law of the United States refuses to recognize that lawful and completed transaction. For so extreme a doctrine support can be found only in plain, unquestioned legislative order; and such order cannot be discovered in this statute" (p. 183).

That decision was affirmed by this Court. *Neilson* v. *Rhine Shipping Co.*, 248 U. S. 205. At the same term this Court held that the statute did not apply to advances made abroad by foreign vessels pursuant to contracts valid where made. *Sandberg* v. *McDonald* (*The Talus*), 248 U. S. 185.

Mr. Justice Day said there was nothing in the language of the statute to indicate an intention to control such matters otherwise than in the ports of the United States.

"The statute makes the payment of advance wages unlawful and affixes penalties for its violation, and provides that

such advancements shall in no cases, except as in the act provided, absolve the master from full payment after the wages are earned, and shall be no defense to a libel or suit for wages. How far was this intended to apply to foreign vessels? We find the answer if we look to the language of the act itself. It reads that this section shall apply to foreign vessels 'while in waters of the United States.'

Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 357. In *Patterson* v. *Bark Eudora, supra*, this court declared such legislation as to foreign vessels in United States ports to be constitutional. We think that there is nothing in this section to show that Congress intended to take over the control of such contracts and payments as to foreign vessels except while they were in our ports. Congress could not prevent the making of such contracts in other jurisdictions. If they saw fit to do so, foreign countries would continue to permit such contracts and advance payments no matter what our declared law or policy in regard to them might be as to vessels coming to our ports.

In the same section, which thus applies the law to foreign vessels while in waters of the United States, it is provided that the master, owner, consignee, or agent of any such vessel, who violates the provisions of the act, shall be liable to the same penalty as would be persons of like character in respect to a vessel of the United States. This provision seems to us of great importance as evidencing the legislative intent to deal civilly and criminally with matters in our own jurisdiction. Congress certainly did not intend to punish criminally acts done within a foreign jurisdiction; a purpose so wholly futile is not to be attributed to Congress. *United States* v. *Freeman*, 239 U. S. 117, 120. The criminal provision strengthens the presumption that Congress intended to deal only with acts committed within the jurisdiction of the United States" (pp. 195-6).

In *Strathearn Steamship Company* v. *Dillon*, 252 U. S. 348, which involved a claim for half wages under Sec. 4 of this act, this Court said:

"In the case of *Sandberg* v. *McDonald*, 248 U. S. *supra*, we found no purpose manifested by Congress in § 11 to inter-

fere with wages advanced in foreign ports under contracts legal where made. That section dealt with advancements, and contained no provision such as we find in § 4. Under § 4 all contracts are avoided which run counter to the purposes of the statute" (p. 355).

The exact words of Section 4, referred to above, were "all stipulations in the contract to the contrary shall be void."

(*b*) *The statute in issue, as amended June 5, 1920.*

The statute was further amended by Sec. 32 of the Merchant Marine Act, Act of 1920 (41 Stat. 1007), by the insertion in Par. (*a*) of the italicized words, which now reads:

"The payment of such advance wages or allotment *whether made within or without the United States or territory subject to the jurisdiction thereof,* shall in no case except as herein provided absolve the vessel or the master or owner thereof from the full payment of wages * * *"

It is upon this amendment that the petitioners rely. But Judge Hand held that the statute as amended did not apply to the payment of advances by a foreign ship in a foreign port.

"It is contended on behalf of libellants that the amendment of the former clause by the insertion of the words 'whether made within or without the United States or territory subject to the jurisdiction thereof,' shows that Congress intended to forbid advances by foreign vessels in foreign ports. But the later clause (*c*) providing that: 'This section shall apply as well to foreign vessels while in the waters of the United States, as to vessels of the United States' was in the section before amendment and remained after amendment. The words 'as well to foreign vessels while in the waters of the United States as to vessels of the United States' have no qualifying meaning if the section has the same bearing on foreign as on American vessels. It seems more logical to suppose that the words 'whether made within or without the United States' were inserted in order to prohibit advances to seamen on American vessels, though made in for-

eign ports, and to avoid the effect of the decision of the Supreme Court in *Neilson* v. *Rhine Shipping Co.*, 248 U. S. 205, which held such advances permissible" (R. 64).

Everything said in the *Talus* and *Windrush* cases, as quoted above, applies with equal force to the present issue. This is an amendment to existing law, the history of which has been traced. The plain and effective purpose of the addition of the words "whether made within or without the United States or territory subject to the jurisdiction thereof" in Par. (*a*) was to apply the statutory prohibition to advances made by American vessels in foreign ports. The remainder of the section being unchanged, the presumption is that it has the meaning acquired by prior judicial construction. Par. (*a*) continued, without change, to limit the application of the section to foreign vessels "while in waters of the United States." The express language of the act is reinforced by every presumption. The remedial and penal provisions of the section cannot be separated, and it is not to be supposed that Congress intended to punish criminally acts done by an alien in his own country and valid there. Legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction. No public policy sanctions a refusal to recognize such a lawful and completed transaction. For so extreme a doctrine as the appellants contend, support must be found, as Judge Hough said in the *Windrush* case, "only in plain, unquestioned legislative order; and such an order cannot be discovered in this statute."

In the *Talus* case this Court pointed out the change required to make the prohibition applicable to foreign vessels abroad. Mr. Justice Day said that "had Congress intended to make void such contracts and payments, a few words

would have stated that intention, not leaving such an important regulation to be gathered from implication." In making the amendment of 1920, Congress did not adopt this Court's suggestion. The amendment says nothing about making such payments void, and any contention that subdivision (*a*) is applicable to foreign vessels abroad still rests on implication. In fact, the amendment, being confined to subdivision (*a*) and leaving unchanged subdivision (*c*), on which the *Talus* decision is founded, confirms the prior interpretation, and makes it more apparent than before that the provision as to advances was not intended to apply to foreign vessels abroad.

The petitioners' attempt to give independent significance to Par. (*c*) of the Jones Act is wholly ineffective. It is useless to argue that the words "while in waters of the United States" were retained for the purpose of separating the remedial from the penal provisions. It was expressly held in *The Windrush*, 250 Fed. 180, 183, that the remedial and penal provisions were inseparable. Nor do the appellants advance their argument by the further suggestion that while the remedial and penal provisions may be coextensive with respect to American vessels, they are separable with respect to foreign vessels. For the *Talus* case involved advances by a foreign vessel in a foreign port and it was held that the penal provision is as wide as the prohibition itself and covers every advance. 248 Fed. 670, 674; 248 U. S. 185, 186. *The Imberhorne*, 240 Fed. 830, was expresaly rejected in *The Windrush*, 250 Fed. 180.

The Jones Act made no distinction between remedial and penal provisions. It merely inserted the words "whether made within or without the United States or territory subject to the jurisdiction thereof" after the words "The payment of such advance wages or allotment," the word "such"

referring to the advance wages forbidden and made criminally punishable by the two preceding sections of subdivision (a). The retention of the word "such", which tied up the sentence in which the new words were interpolated to the preceding sentences, clearly shows that Congress intended to keep the remedial provisions co-extensive with the penal provisions. If Congress had intended to separate them, it would at least have eliminated the word "such". Instead of doing that, or removing the limitation in subdivision (c), Congress merely added a clause which in the light of the other provisions of the section could apply only to acts done outside the United States by American vessels. The real distinction is not between remedial and penal provisions but between American and foreign vessels abroad.

The petitioners' resort to Senator Jones's remarks when the amendment of 1920 was under consideration in the Senate is futile, because the Senator did not mention foreign vessels. His personal views would in no event have any bearing upon the construction of the statute.

The petitioners express surprise that Congress by the Amendment of 1920 should have singled out for legislative change one decision of the Supreme Court, and ignored another decided the same day. Congress indicated very clearly by its act that it designed to apply the prohibition of advances to American vessels both within and without the United States; but it is a pure assumption on the part of the petitioners to suppose that Congress had any interest in applying the prohibition to advances made abroad by foreign vessels. That Congress had no such intention, and was therefore not concerned with the judicial construction of the statute in the *Talus* case, is clearly indicated, as Judge Hand

held, by the absence of any change in the terms of Par. (e), upon which that construction was based.

The supposed disadvantage to American vessels in engaging seamen in foreign ports, under the construction of the statute by the District Court, is theoretical and illusory. American vessels sail with full crews shipped for the voyage. Only on exceptional occasions, and in small numbers, are seamen shipped abroad. And to this extent there is no disadvantage or difficulty in view of the notoriously higher wages paid by American vessels.

SECOND POINT

THE PETITIONERS WERE NOT ENTITLED TO ANY WAGES, UNDER SECTION 4530, REVISED STATUTES.

This section provides that demand for wages shall not be made more than once in the same harbor on the same entry:

"Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void: Provided, Such a demand shall not be made before the expiration of, nor oftener than once in, five days nor more than once in the same harbor on the same entry. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall

be then due him, as provided in section forty-five hundred and twenty-nine of the Revised Statutes: * * * And provided further, That this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement." Rev. St., § 4530.

The *Archimedes* arrived in New York on Thursday, June 1. On Saturday, June 3, all the petitioners drew advances. They marked on a list the amount desired, which they received (R. 35, 36, 47-48; Wilson, R. 10-11, 13-14, 15; Hooper, R. 17, 20; Jackson, R. 23, 26, 27; Shotton, R. 29-30, 32-33; Lewis, R. 36, 40-41).

Although they did not formally demand half wages as such, they received the amounts asked for. The master of the vessel told them that "they could have any reasonable amount, so long as it was due them", but that they must take it all at one time (R. 48). Having drawn once they were not entitled under the statute to another payment five days later.

The demand for half wages on June 8 was in fact, as the District Judge intimated (R. 62), a mere pretext, whereby these petitioners, who were dissatisfied with a new mate (R. 39-41, 43), sought to desert the vessel without forfeiting the balance of their wages.

THIRD POINT

THE WAITING TIME PENALTY OF SECTION 4529, REVISED STATUTES, DOES NOT APPLY TO FOREIGN VESSELS, NOR TO PAYMENTS WITHHELD FOR SUFFICIENT CAUSE.

In no event would the petitioners be entitled to waiting time as claimed. Rev. St., § 4529, reads:

"The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages or from a port on the Atlantic to a port on the Pacific, or *vice versa*, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage."

Section 4530 expressly applies "to foreign vessels while they are in harbors of the United States." But section 4529 contains no such provision, nor does it mention "foreign vessels". It refers to two classes of vessels, those making coasting voyages and those making foreign voyages. The petitioners cite no case which has applied the waiting time penalty of section 4529 to foreign vessels. Section 4529

penalizes only for refusal or neglect to pay "without sufficient cause". No waiting time was allowed by the District Courts in *Neilson* v. *Rhine*, 244 Fed. 833, or in *The Talus*, 242 Fed. 954, which gave the seamen decrees for wages. In the case at bar the District Court held that no wages were due the appellants. There was sufficient cause for non-payment.

The provision in section 4530 that "when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall be then due him, as provided in section 4529 of the Revised Statutes" is to make the remaining half of his wages payable within the time fixed by section 4529. "When the voyage is ended" has been held to refer, not to the discharge of a particular cargo, but to the "completion of the voyage shipped for". *The Cubadist*, 256 Fed. 203, *certiorari* denied, 249 U. S. 618. There the Court analyzed both sections and pointed out that section 4529 "provides for the payment of the full wages due seamen", while section 4530 provides for "partial payments to be made during the progress of the voyage".

Section 4530 punishes the shipowner for failure to pay half wages by making him liable for the full wages earned and unpaid. Congress considered this a sufficient penalty and did not impose the further penalty of section 4529 except in respect of "the remainder of the wages due when the voyage is ended". Here the appellants did not stay on the ship until the completion of the voyage, but deserted, and thereby forfeited all wages due them. *The City of Norwich*, 279 Fed. 687.

LAST POINT

IT IS RESPECTFULLY SUBMITTED THAT THE DECREE BELOW SHOULD BE AFFIRMED.

BURLINGHAM, VEEDER, MASTEN & FEAREY,
Proctors for Respondent.

VAN VECHTEN VEEDER
WILLIAM J. DEAN
Of Counsel.

Appendix

Act of March 4, 1915, To promote the welfare of American seaman, Section 11, as amended by the Merchant Marine Act, 1920, Section 32.

"Advances and allotments.—(*a*) It shall be unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages, or to make any order, or note, or other evidence of indebtedness therefor to any other person, or to pay any person, for the shipment of seamen when payment is deducted or to be deducted from a seaman's wages. Any person violating any of the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than $25. nor more than $100, and may also be imprisoned for a period of not exceeding six months, at the discretion of the court. The payment of such advance wages or allotment, whether made within or without the United States or territory subject to the jurisdiction thereof, shall in no case except as herein provided absolve the vessel or the master or the owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages. If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment, as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be deemed guilty of a misdemeanor and shall be imprisoned not more than six months or fined not more than $500.

(b) It shall be lawful for any seaman to stipulate in his shipping agreement for an allotment of any portion of the wages he may earn to his grandparents, parents, wife, sister, or children.

(c) No allotment shall be valid unless in writing and signed by and approved by the shipping commissioner. It shall be the duty of the said commissioner to examine such allotments and the parties to them and enforce compliance with the law. All stipulations for the allotment of any part of the wages of a seaman during his absence which are made at the commencement of the voyage shall be inserted in the agreement and shall state the amounts and times of the payments to be made and the persons to whom the payments are to be made.

(d) No allotment except as provided for in this section shall be lawful. Any person who shall falsely claim to be such relation, as above described, of a seaman under this section shall for every such offense be punished by a fine not exceeding $500 or imprisonment not exceeding six months, at the discretion of the court.

(e) This section shall apply as well to foreign vessels while in waters of the United States, as to vessels of the United States, and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for similar violation. The master, owner, consignee, or agent of any vessel of the United States, or of any foreign vessel seeking clearance from a port of the United States, shall present his shipping articles at the office of clearance, and no clearance shall be granted

any such vessel unless the provisions of this section have been complied with.

(*f*) Under the direction of the Secretary of Commerce the Commissioner of Navigation shall make regulations to carry out this section. (June 26, 1884, c. 121, § 10, 23 Stat. 55; June 19, 1886, c. 421, § 3, 24 Stat. 80; Dec. 21, 1898, c. 28, § 24, 30 Stat. 763; Apr. 26, 1904, c. 1603, § 1, 33 Stat. 308; Mar. 4, 1915, c. 153, § 11, 38 Stat. 1168; June 5, 1920, c. 250, § 32, 41 Stat. 1006.)"

Code of the Laws of the United States, Title 46, Section 599, page 1515.